Affirmed and Memorandum Opinion filed March 18, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-00773-CR

LIONEL NEWMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1043620

M E M O R A N D U M O P I N I O N

A jury found appellant, Lionel Newman, guilty of burglary of a habitation, and the trial court sentenced him to thirty-five years' confinement. Appellant challenges the trial court's denial of his post-conviction motion for DNA testing. Because all dispositive issues are settled in Texas law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.

I. BACKGROUND

With due consideration for judicial economy, we repeat the factual background from our earlier opinion wherein we affirmed the trial court's judgment:

> On the morning of May 6, 2000, Dr. Victor Zurita, complainant, awoke when he heard the sound of glass breaking on the first floor of his home. He went downstairs to investigate. He saw an African-American man entering his house through a broken window with one arm and one leg inside the house. Zurita yelled at him, "Get away." The man took off running through the garage. Zurita heard a car drive away. Zurita woke up his wife and sister-in-law who were also sleeping in the house. His wife called the police.
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> Houston Police Officer Steven Derrick arrived twenty minutes later. Zurita went with Officer Derrick to search the back of the house, where the broken window was located. They observed that the garage door was open and saw an old computer, monitor, and large toy car neatly stacked outside the garage. Zurita testified that the garage door was closed and unlocked the night before and the computer, monitor, and toy car were inside the garage. Officer Derrick observed fingerprints on the broken window. Officer John Gray, a Houston police fingerprint analyst, came to the scene to recover the prints on the glass from the broken window. Officer Rafael Saldiver, a latent print examiner for the Houston police, reviewed the prints and determined they matched appellant's fingerprints.

Newman v. State, No. 14-05-01125-CR, 2007 WL 1437624, at *1 (Tex. App.—Houston [14th Dist.] May 17, 2007, pet. ref'd) (mem. op., not designated for publication). Subsequent to issuance of the above-cited opinion, appellant filed a writ of habeas corpus, which was ultimately denied by the Court of Criminal Appeals without written order. *Ex Parte Newman*, 32, 652-08 (Oct. 15, 2008).[1]

In December 2007, appellant filed a *pro se* "Motion for Forensic DNA Testing" in the trial court. In his motion, appellant argued that the State is in possession of biological evidence subject to DNA testing. He based this claim on the following: (1) the complainant's testimony that the person who broke into his house apparently cut himself because there was broken glass and "a lot of blood"; and (2) the crime scene investigator's testimony he recovered ten large pieces of broken glass at the scene.

An attorney was appointed to represent appellant, and his motion was forwarded to the State in February 2008. In June 2008, the State filed a "Motion Requesting Court

[1] Appellant was also denied habeas relief in federal court. *See generally Newman v. Thaler*, Civil Action No. H-09-0797, 2009 WL 3602074 (S.D. Tex. Oct. 27, 2009).

to Deny DNA Testing." Following a hearing, the trial court signed an order denying appellant's motion and adopting the State's proposed findings of fact and conclusions of law.

II. ANALYSIS

In his first issue, appellant contends the trial court erred by denying his post-conviction motion for DNA testing.

We review a trial court's denial of a request for post-conviction DNA testing under a bifurcated standard. *See Esparza v. State*, 282 S.W.3d 913, 921 (Tex. Crim. App. 2009). We defer to the trial court's findings of fact when they are supported by the record. *Id.* We also defer to the trial court's application of law to fact questions that turn on credibility and demeanor. *Id.* However, we review pure legal issues *de novo*. *Id.*

"A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion." Tex. Code. Crim. Proc. art. 64.01(a) (Vernon 2006 & Supp. 2009). The convicting court may order DNA testing only when it finds evidence "(i) still exists and is in a condition making DNA testing possible; and (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect[.]" *Id.* art. 64.03(a)(1)(A) (Vernon 2006 & Supp. 2009).

Attached to the State's "Motion Requesting Court to Deny DNA Testing" were affidavits of a clerk from the Harris County District Clerk's Office and custodians from the Crime Laboratory Office-Property Room and Latent Laboratory of the Houston Police Department. The State argued these "affidavits reflect that the State is not in possession of evidence containing any biological matter which can be subjected to forensic DNA testing." In its findings of fact and conclusions of law, the trial court expressed that appellant "fail[ed] to meet the requirement of Article 64.03(a)(1) . . . by

showing that evidence still exists and is in a condition making DNA testing possible." *See Cravin v. State*, 95 S.W.3d 506, 511 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (trial court did not err in finding that no DNA evidence existed because State's response explained district clerk and sheriff's department did not possess any evidence).

On appeal, appellant presents the following argument pertaining to the finding that no testable evidence exists:

> Even if there is no substance to test, that factor should be presented to a trier of fact as evidence the State failed in its burden to prove beyond a reasonable doubt the Appellant committed the offense. As blood evidence was available, as a matter of justice, the State should be required to seize that evidence and have it tested. The lack of collection of available evidence and having it tested to prove or disprove the Appellant's guilt is imperative where a person's liberty is at stake.

Appellant cites no authority for the proposition that we should order the State to locate and test blood evidence it never collected.[2] Accordingly, appellant does not demonstrate that the trial court erred in failing to compel the State to produce a testable amount of blood evidence. We overrule appellant's first issue.

In his second issue, appellant contends the trial court's denial of his motion for DNA testing deprived him of an opportunity to challenge the factual sufficiency of evidence supporting his conviction. Specifically, appellant argues, "Had DNA testing been performed revealing evidence of someone else's DNA, [appellant] would have a basis for raising factual sufficiency of the evidence." Because appellant failed to establish that the trial court erred in denying his post-conviction motion for DNA testing, we cannot hold he has been impermissibly deprived of the opportunity to challenge factual sufficiency of the evidence supporting his conviction. Accordingly, we overrule appellant's second issue.

[2] Furthermore, appellant waived his argument that denial of his motion resulted in a due-process violation because he failed to raised in the trial court. *See* Tex. R. App. P. 33.1(a); *Sepeda v. State*, 301 S.W.3d 372, 374 (Tex. App.—Amarillo 2009, no pet.) ("Even constitutional claims of due process may be waived.").

We affirm the trial court's order.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.

Do Not Publish — Tex. R. App. P. 47.2(b).